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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

February 11, 1993

Ms. Donna R. Searcy  
Secretary  
Federal Communications Commission  
1919 M Street  
Washington, D.C. 20554

Re: Reply Comments  
MM Docket No. 92-266

Dear Ms. Searcy:

Transmitted on behalf of The West Virginia Cable Television Advisory Board, please find an original plus nine copies of its Reply Comments in the Cable Television Rule Making presently before the Federal Communications Commission in MM Docket No. 92-266.

Sincerely yours,

*Matthew L. Leibowitz, mdr.*

Matthew L. Leibowitz  
Counsel for The West Virginia  
Cable Television Advisory Board

MLL/mdr

Enclosures

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Before the  
Federal Communications Commission  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

Implementation of Section 8 of  
the Cable Television Consumer  
Protection and Competition Act  
of 1992

## Rate Regulation

MM Docket No. 92-266

TO: The Commission

REPLY COMMENTS OF  
WEST VIRGINIA CABLE TELEVISION ADVISORY BOARD

Respectfully Submitted,

Donald L. Darling  
Counsel for West Virginia  
Cable Television Advisory Board

Matthew L. Leibowitz  
Special Communications Counsel  
for West Virginia Cable Television  
Advisory Board

February 11, 1993

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SUMMARY

\* The West Virginia Cable Television Advisory Board regulates cable television within the state, pursuant to Article 18 of the West Virginia statutes. Encompassed within the Board's powers and duties is rate regulation.

\* The FCC should recognize the States, as well as local franchise authorities, authority to regulate basic service tier rates.

\* The FCC should permit state and local franchise authorities to initially review subscriber complaints for cable programming rates for the basic service tier and with the subscriber's consent on cable programming services to the extent permitted by the FCC.

\* Where no state or local franchise authority seeks certification for rate regulation, the FCC must provide rate regulation for basic service tier rates.

\* The FCC rules should provide for maximum flexibility to adopt procedures for rate regulation and for complaint procedures, including paper hearings and initial decisions to be made by the staff.

\* Effective competition must be measured in only those areas actually served by cable operators and not by franchise area.

\* A state or local franchise authority seeking certification for rate regulation should not be required to prove the absence of effective competition. However, the cable operator would have the burden of proof in any revocation of certification proceeding to demonstrate the existence of effective competition.

\* Small systems must be held to the same reasonable standard test for basic service tier rates.

\* The FCC should not allow cable operators to raise rates below any Benchmark established by the Commission without a showing that the raises are reasonable.

\* The FCC in adopting Benchmarks for basic service tier rates should discount for the costs of gold-plating or excessive debt service which is due as the result of monopoly prices paid for the acquisition of a cable system.

\* During the implementation of the FCC's new rules, cable subscribers should not be charged for changes in service and should be charged for downgrade changes only in limited instances after the implementation period.

\* Subscribers should not be charged for disconnects.

Before the  
Federal Communications Commission  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
Implementation of Section 8 of )  
the Cable Television Consumer )  
Protection and Competition Act )  
of 1992 )  
Rate Regulation )

MM Docket No. 92-266

TO: The Commission

REPLY COMMENTS OF  
WEST VIRGINIA CABLE TELEVISION ADVISORY BOARD

1. The West Virginia Cable Television Advisory Board ("Board"), through undersigned counsel, hereby submits its Reply Comments in the Federal Communications Commission's Rule Making in the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 ("Act") concerning Rate Regulation.

2. Cable television within the State of West Virginia is regulated pursuant to the West Virginia Cable Television Systems Act, Article 18 of the West Virginia statutes.<sup>1</sup> Pursuant thereto, the West Virginia legislature established the Board for the purposes of, including but not limited to developing and maintaining a statewide plan for provision of cable services;

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<sup>1</sup> Presently 110 cable operators provide cable service to over 470,000 subscribers in the State of West Virginia. Approximately one half of the systems provide service to fewer than 1,000 subscribers. See Appendix A.

providing rules and regulations for cable services within the State of West Virginia; providing advice and technical assistance to other franchise authorities within the state; establishing minimum specifications for equipment, service and safety of cable; and representing the interest of the citizens of West Virginia before the Federal Communications Commission with respect to cable television. The Board consists of seven members including two cable representatives: one representing cable systems with in the aggregate, more than 5,000 subscribers and one representing smaller cable systems. Thus, West Virginia, similar to thirteen other states in the country, provides for cable television oversight on a statewide basis.

3. Specifically, in the case of West Virginia the legislature provided specific and pervasive statutory mechanisms and requirements, including but not limited to cable franchise application procedures; public hearings; issuance of the franchise authority; criteria with respect to installation, construction, operation, removal and alteration of equipment; renewal of franchises; and transfer of franchises. In addition thereto, Section 5-18-16 specifically provides that the Board shall regulate rates to ensure that they are just and reasonable, both to the public and to the cable operator, and are not unduly discriminatory. Accordingly, since 1991 the Board has provided cable rate regulation on a statewide basis with input and support

from local franchise authorities.<sup>2</sup>

State Board Authority to Regulate Rates

4. As the National Association Telecommunications Officers and Advisors ("NATOA") noted in its Comments at footnote 15 on page 31, "The Commission should not attempt to define who is authorized to regulate rate. Rather state and local law should identify the appropriate cable rate regulatory authority." In this context, as noted above, pursuant to the will of the West Virginia legislature within the State of West Virginia pursuant to Article 18 of the West Virginia statutes, rate regulation is solely within the duties of the Board. Thus, the FCC must recognize such state authority and the implementation of its rate regulation rules must not impair the ability of the Board to certify its willingness and authority to provide such rate regulation within the State of West Virginia.<sup>3</sup>

5. Moreover, where there are state authorities, we believe the cable industry will support rate regulation by state authorities. For instance, the Community Antenna Television Association ("CATA") in its Comments, at pages 23 through 24, cites as an example Triax Communications which serves some 348,000

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<sup>2</sup> Pursuant to the West Virginia statute, a franchise authority could be a municipality, a county commission or the Board. In fact, the Board acts as the local franchise authority in three counties.

<sup>3</sup> The Board supports the belief that the Act empowers state and local franchise authorities to enter into rate regulation without express state authority. However, where a state board or commission exists, it should be up to the state to determine which level of government should regulate cable rates: the state, counties or municipalities.

subscribers from 466 head ends under 1,075 different franchises.<sup>4</sup> CATA is concerned that each different franchise authority would initiate a proceeding that would require cost justifications by Triax in each individual community.<sup>5</sup> In West Virginia, the Board will review Triax's rates in a single unified proceeding, thus greatly reducing the burden on local authorities, as well as the cable operator.<sup>6,7</sup>

6. Similarly, the National Cable Television Association ("NCTA") at pages 74 through 75, proposes with respect to the complaint procedure for cable programming service rates, that complainants be required to present their complaints to the local franchise authority for initial evaluation. While the Board does not believe that the Act intended for a subscriber's complaint to be reviewed by the local franchise authority as a condition precedent for FCC review, the Board supports a permissive delegation of the FCC authority with the consent of the subscriber.

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<sup>4</sup> In fact, Triax Cablevision USA, L.P. serves 48,653 subscribers and Triax Southeast Associates, L.P. serves an additional 1,959 subscribers within West Virginia.

<sup>5</sup> CATA's assumption of three public meetings in each proceeding is a gross exaggeration of the potential burden. One public meeting is more likely.

<sup>6</sup> The Board does not agree with the proposal by CATA at pages 24 and 25, that a cable operator could demonstrate that it is deriving neither excess profits nor incurring undue costs on a system-wide basis, and therefore in unified, showing that its rates being charged by the company can be reasonable. Rather, pursuant to the Act, the cable operator must show that its rates in each system are reasonable.

<sup>7</sup> By coincidence, a Triax representative is presently one of the cable industry representatives on the Board.



Under this mechanism, the Board would be able to greatly reduce the burden on the FCC staff by initially reviewing any complaints and attempting to resolve subscriber complaints, rather than the FCC receiving initial subscriber complaints from over 55 counties and 228 cities that are local franchise authorities in West Virginia. Only complaints by subscribers that do not consent to the Board's participation or complaints that could not be resolved by the Board or its staff would go to the FCC for resolution.<sup>8</sup>

7. As noted throughout comments by the cable industry, including but not limited to the Comments of NCTA and the Comments of CATA, local franchise authorities may find it difficult and expensive to provide cable rate regulation or they may lack the resources to provide rate regulation on a local basis. Therefore, such local franchise authorities will not seek certification from the FCC for rate regulation. Many cable commentators thus reach the conclusion that in the absence of such ability or willingness on the part of the local franchise authority to accept the responsibilities of rate regulation, franchises operating within these areas should be free of any rate regulation. The Board respectfully disagrees. Although the Board intends to file for such

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<sup>8</sup> There is precedent for such a delegation from the FCC to a state agency. In the processing of discrimination complaints, pursuant to the Memorandum of Understanding between the FCC and the EEOC, if the FCC receives a complaint which falls both within its own jurisdiction and the jurisdiction of the EEOC or a state agency, the FCC may refer the matter to the state agency for initial review and defer action on its own until the state agency has completed its review of the matter. See Memorandum of Understanding between the Federal Commission and the Equal Employment Opportunity Commission 43 RR 2d 1505 (1978).

certification at the earliest possible time, in those instances where neither local nor state authorities certify their willingness to implement rate regulation or are not certified by the FCC, we believe it is the clear intent of Congress that the FCC provide such regulation. To interpret the Act otherwise would be to deny citizens within those geographic locations the same protection under the law provided to other citizens in more concentrated urban areas, which would be grossly inequitable.

#### Local and State Regulatory Flexibility

8. As noted above, CATA expresses a great concern for an abundance of public hearings that a cable operator may have to attend and participate in with respect to rate regulation and complaints. The Board believes that local and state authorities should be provided the maximum flexibility to adopt procedures for rate regulation of the basic service tier and for cable programming services to the extent permitted by the FCC and for complaint procedures, while still protecting the due process rights of the participants. For instance, the FCC should allow paper proceedings without formal hearings and for initial decisions to be made by staff similar to the delegation structure of the FCC. See Section 0.283 of the FCC Rules and Regulations.

#### Definition of Effective Competition

9. NATOA, in its Comments at page 14, supports the concept that effective competition should be measured in a cable operator's service area as opposed to the franchise area. The Board specifically supports such a proposition. In West Virginia, cable

franchises are often issued on a countywide basis, thus empowering cable operators to operate throughout the county. However, in reality cable operators are providing service only to smaller areas within the county. Thus, nowhere in the State of West Virginia is there any actual overlapping county cable service. However, technically speaking from a county franchise basis, there are overlapping franchises. Thus, we believe that effective competition should be measured only based upon a cable operator's actual service area where customers are offered service.

10. With respect to the certification process for effective competition, the Board opposes the analysis of the NCTA and CATA and believes that in the first instance the relevant state authority or local franchise authority should be able to submit, based on its good faith analysis, that effective competition does not exist within a given franchise area and that such certification not be required to be based upon data which presently is not available to state and local authorities. The Commission should process such requests for certification and approve it on an expedited basis. In the rare event that a cable operator believes that effective competition does exist, it should have the burden of proof in a written revocation proceeding which includes an opportunity for the state or local franchise authority to comment on the cable operator's petition for revocation to demonstrate to

the FCC that effective competition does exist.<sup>9</sup>

Small Systems

11. CATA, in its Comments, essentially strips away local cable customers presently served by small cable systems of any rate regulation protection. Similarly, NCTA in its Comments at page 85, proposes to shift the burden of proof to the franchise authority to demonstrate unreasonable rates. The Board respectfully disagrees with both approaches. Clearly, the intent of Congress was to provide rate regulation protection to all citizens on an equal basis. It would be fundamentally improper to provide rate protection to citizens located in urban areas and deny citizens similar protection in rural areas. Moreover, requiring that the state or local franchise authority have the burden of proof to demonstrate unreasonably high rates is impossible, since the data that would be required for such a showing would be available only to the cable operator, and in many instances would not be available to the local franchise authority. Further, the Act clearly provides that the appropriate standard for basic service is "reasonable rates," not unreasonable rates, even for small systems.

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<sup>9</sup> During the pendency of such revocation proceeding, the Board submits that it is essential that rate regulation authority be retained by the state or local franchise authority. Only upon a final, non-appeal order revoking rate regulation authority, should the state or local franchise authority be required to terminate rate regulation.

12. In contrast, the Board specifically supports NATOA's suggestion with respect to the treatment of small system rate regulation. We believe NATOA's definition of a small system as found on page 88 which provides for the following criteria is appropriate:

A small cable system for purposes of Section 623(i) includes any stand-alone cable system (including all headends of such system) that serves a total of 1,000 or fewer subscribers in the franchise area(s) in which it provides service; except that Section 632(i) does not include a cable system that: (a) serves a total of more than 1,000 subscribers in multiple franchise areas, even if one or more of the franchise areas has fewer than 1,000 subscribers; and (b) is directly or indirectly owned by a cable operator that directly or indirectly owns other cable systems, and the cable systems directly or indirectly owned by such a cable operator serve a total 45,000 or more subscribers.

Moreover, we specifically support NATOA's treatment of small systems in that Congress did not intend to exempt small systems from rate regulation and compliance, but merely intended to reduce the burdens and costs of such compliance wherever possible.<sup>10</sup>

#### Benchmark

13. The Board is particularly concerned that in the event the FCC adopts a benchmark concept of rate regulation, it is likely that cable operators who provide rates below the benchmark would automatically raise their rates to the newly established benchmark

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<sup>10</sup> The need for rate regulation of small systems is critical. The Board has received several examples of grossly unreasonable requests for rate increases by small system operators. For instance, Anthony Creek Cable, who serves only 320 subscribers, sought a 20% increase in rates. The Board did not approve Anthony Creek's request. Case No. 91-03

without justification. In this regard, the Board agrees with NATOA at page 45, footnote 20, that a cable operator should not be allowed to automatically raise its rates without an appropriate showing. The fact that the cable operator is charging a lower rate does not automatically demonstrate that a rate increase is "reasonable." Thus, the Board believes that in establishing benchmark regulations, the FCC should specifically state that the benchmark is not the equivalent of a national minimum rate, and the rules must require a specific showing of reasonableness by any cable operator seeking to raise rates to that benchmark to discourage increased rates without justification.

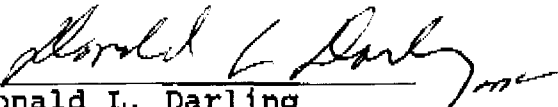
14. The Board also respectfully requests that the Commission in adopting a benchmark concept for rate regulation, include provisions to avoid passing on the cost of gold-plating systems and/or passing on the cost of excess debt which arises from the acquisition of a cable system at monopoly prices, thus placing an undue burden of excess debt service on local subscribers. As noted in the Comments by the Consumer Federation of America, a cable system is sold at a massive premium, which is justified only by the monopoly position of cable operators. See Comments, pp. 63-64. Thus, since the Act is a reflection of Congress's intent to protect consumers from the monopoly effects of cable systems, the Board believes that any evaluation of the cost of capital or debt service be discounted to reflect the monopoly premium paid for cable systems.

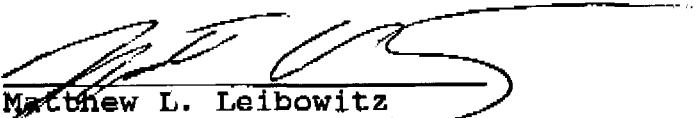
Installation and Other Charges

15. The Commission and most commenters recognize that it is likely cable operators will restructure their cable offerings and rates in response to the Act and the implementing rules and regulations. As a result, cable customers will be confronted with many new decisions. The Board specifically believes that in those instances there should be no charges for any disconnects or changes of service. Moreover, as reflected by Title 187, Legislative Rules, Cable Television Advisory Board, Series 2, Implementing Regulations, the Board believes that no subscriber should be charged for any disconnect fee at any time. Further, no fee should be charged for changing to a less expensive cable service tier except where (1) the downgrade charge is applied only to subscribers who have not been subject to a rate increase within the preceding 30 days; and (2) the downgrade charge does not exceed the lesser of the actual out-of-pocket cost to perform the downgrade or the usual connection fee for new subscribers charged by the cable operator, but in no event shall the downgrade charge exceed \$50.00. However, where a subscriber seeks to switch and substitute one or more premium channels with a less expensive premium channel or group of premium channels, this change in service will not be considered a downgrade subject to this rule, and the subscriber may be charged a reasonable fee for this change in service. Similarly, the Board believes that at least in those

instances where a disconnect or downgrading of service is in response to a programming change, there should be no service charge.

Respectfully submitted,

  
Donald L. Darling  
Counsel for West Virginia  
Cable Television Advisory Board

  
Matthew L. Leibowitz  
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Advisory Board

February 11, 1993

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APPENDIX A

NAME OF COMPANY	NO. OF SUBSCRIBERS
A & F TV CABLE	197
AAA CABLE	112
ANTHONY CREEK CORPORATION	320
ARMSTRONG UTILITIES	5,831
BASCO	586
BECKLEY ANTENNA CO DBA/ BECKLEY TELECABLE	20,457
BIG FOUR ANTENNA SERVICE	70
BLAIR HAVEN ENTERTAINMENT INC DBA/ COMM. DOWNLINK	48
BLUE DEVIL CABLE TV INC	1,349
BOB'S TV SERVICE INC	1,033
BOCCO CABLE	119
BOWEN CABLEVISION INC	1,211
BRADLEY'S INC	2,443
BRANDYWINE CABLE	290
BUD-ALPOCA TV CABLE CLUB INC	130
C & W CABLE TV	256
C/R TV CABLE INC	5,805
CABLE EQUITIES OF THE VIRGINIAS, LTD	11,126
CABLE FRANCHISES, INC	16,525
CABLE OF THE CAROLINAS	1,137
CAPITOL CABLEVISION	33,535
CEDAR GROVE CABLEVISION ASSOCIATES, L.P.	3,343
CENTER STATE CABLE	515
CENTRE TV INC	1,939
CENTURY HUNTINGTON COMPANY	48,880

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CLEAR VISION CATV SYSTEMS	420
CLEARVIEW TV CABLE	1,170
CLINE CATV INC	450
CMA CABLEVISION ASSOCIATES VII, LP	4,630
CMA CABLEVISION ASSOCIATES XL, LP	1,986
CMA MINGO CABLEVISION ASSOCIATES L P	2,264
COAXIAL COMMUNICATIONS OF SOUTHERN OHIO, INC	1,148
COLANE CABLE TV INC	596
COMMUNITY ANTENNA SERVICE	2,530
COONEY CABLE ASSOCIATES OF WEST VIRGINIA, L P	2,396
COUNTRY CABLE	795
CROSS ROADS TV CABLE	71
C T & R CABLE	338
D & C CABLE	240
D & S CABLE	55
DIVERSIFIED CABLE	515
DODDRIDGE COUNTY CABLE	0
EAST SHINNSTON CABLE ORG INC	93
ECONOCO INC	2,260
FAIRCLARK CABLE TV INC D/B/A/ CVI CABLEVISION	13,742
FAIRMONT CABLE TV INC D/B/A CVI CABLEVISION	10,162
FORT SPRING COMMUNICATIONS	120
GARY'S TV & STEREO	206
GREENBRIER CABLEVISION ASSOCIATES, L P	3,219
H & R CABLE TV INC	199
HARMAN CABLE CORP	206
HARMON CABLE COMMUNICATIONS	13,893
HELICON CABLEVISION	13,632

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HURLEY CABLEVISION	300
I & I CABLE	80
J & B CABLE	0
JANNEY CABLE TV CO D/B/A BECKLEY TELECABLE	1,030
JEFFERSON COUNTY CABLE TV	111
JIM'S RADIO & TV SERVICE	280
JOHNSTOWN CABLE SERVICE	20
JONES TV CABLE & SATELLITE SYSTEMS, INC	205
KANAWHA CABLEVISION	697
KY/WV CABLE INC	90
MANNINGTON TV INC	1,034
MAPLE LAKE TV CLUB	140
MARSHALL COUNTY CABLE, INC	845
MASTER TELECABLE, INC	685
MID SOUTH CABLE D/B/A BERKELEY CABLE	2,084
MIDDLEBOURNE TV CABLE CO	400
MOUNTAINEER CABLEVISION INC	1,706
NORTON TV CABLE	166
OBEYS TV CABLE	89
P & D CABLE	195
PHILIPPI COMMUNICATIONS	1,303
POCAHONTAS CABLEVISION	1,393
QUICK INC	1,450
R & N SATELLITE CABLE TV	110
R & R CABLE CO	90
RIFKIN/CCG INC D/B/A CABLEVISION	13,817
RONCEVERTE TELEVISION CORPORATION	1,027
RON'S CABLE TV CO	189

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SHELLIE CABLE CO	43
TCI OF WEST VIRGINIA, INC	88,821
TELE-COM INC	942
TELE-MEDIA COMPANY OF KWV	2,484
TELE-MEDIA COMPANY OF NORTHFORK	1,933
TELE-MEDIA COMPANY OF SMITHERS	462
TELEHOME SERVICES INC	489
TELESCRIPPS CABLE COMPANY	10,035
THOMPSON CABLEVISION CO INC	11,029
TIMES MIRROR CABLE TELEVISION OF OHIO VALLEY INC	8,625
TODS TV LINE	160
TOP CABLE	105
TRIAx CABLEVISION USA, L P	48,653
TRIAx SOUTHEAST ASSOCIATES, L P	1,959
TURNER ENTERPRISES INC	152
TV CABLE OF INWOOD	3,446
UNITED CABLE CORPORATION	1,042
UNIVERSAL CATV SYSTEMS INC	312
VALLEY CABLE SYSTEMS	480
VALLEY CABLEVISION INC	601
VIDEO CABLE COMPANY, INC D/B/A PRINCETON TELECABLE	10,755
VOGELERS CATV	250
WAKE COMMUNICATIONS	216
WALKERS TV SERVICE	285
WARNER CABLE COMMUNICATIONS	6,581
WHITMER CABLE VISION	78

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WILDERNESS CABLE COMPANY D/B/A/ CENTURY CABLE

4,123

WYOMING CABLE TELEVISION INC

3,065

110 companies  
471,565 subscribers

**CERTIFICATE OF SERVICE**

I, Maria Riveron, hereby certify that the attached Reply Comments submitted on behalf of the West Virginia Cable Television Advisory Board was sent this 11th day of February, 1993 to the following person(s) via U.S. mail, first class postage prepaid:

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Washington, D.C. 20036


Counsel for the National Association of Telecommunications Officers and Advisors, National League of Cities, United States Conference of Mayors, and the National Association of Counties

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Signature